U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

Date: April 19, 1991

Case No: 89-INA-178

In the Matter of:

YARON DEVELOPMENT CO., INC.,
Employer

on behalf of

EITAN ARZI,
Alien

Before: Brenner, Glennon, Groner, Guill, Litt, Romano, Silverman and Williams
Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

This matter arises from a request for administrative-judicial review of a denial of labor certification under section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14), and Title 20, Part 656 of the Code of Federal Regulations. On January 4, 1990, a panel of the Board of Alien Labor Certification Appeals (Board) issued a decision affirming the Certifying Officer's (CO) denial of labor certification. Upon petition of Employer, en banc review was granted in an Order dated March 7, 1990.

Background

Employer, Yaron Development Co., Inc., a real estate investment company, seeks labor certification on behalf of the Alien, Eitan Arzi, for the position of "Controller." Although there are other issues in the case, the sole question currently before the Board is whether Employer made a reasonable effort to contact the U.S. applicant, Peter J. Lukas, III.

Employer advertised the job in the Wall Street Journal on April 6, 1988 (AF 8a; 52), and kept a job order on file with the Connecticut job service from March 30 to May 10, 1988 (AF 27). Mr. Lukas was one of 47 U.S. applicants for the position. In a May 16, 1988 recruitment report Employer stated why it had rejected 14 applicants, of whom only two were actually

interviewed (AF 52-53). On May 19, 1988, the Connecticut job service office wrote to Employer inquiring why it had not accounted for 29 additional resumes, one of which was Mr. Lukas' (AF 34-35). On June 22, 1988, Employer filed a second recruitment report (dated June 20, 1988) on 31 applicants, including Mr. Lukas. Employer interviewed only one of these applicants.

In the second recruitment report Employer indicated that it had rejected Mr. Lukas based on his failure to return Employer's telephone call (AF 50). The report is not detailed; it states only: "We called him. Left a massages [sic]. He didn't called [sic] back." (AF 50) Thus it is unclear whether Employer left only one message, or multiple messages. It is also unknown on what date between the opening of the job order on March 30 and the June 20 report Employer attempted to contact Mr. Lukas, with whom the message was left, or what the content of the message was.

Mr. Lukas' cover letter to his resume, dated April 10, 1988, stated that he was requesting a personal interview, and provided both work and residential telephone numbers. He indicated that messages could be left with either his receptionist or his wife, and promised to return a call at his earliest opportunity (AF 18). His resume indicates extensive, high-level experience in financial management, including his most recent positions, beginning in 1980, as chief financial officer for realty analysis and investment companies (AF 19-22). Employer's requirements for the job were a Bachelor's degree in Accounting, and four years of experience in the job offered: controller of a real estate investment company (AF 40).

The CO issued a Notice of Findings on July 28, 1988 finding, inter alia, that Employer's furtive attempt to contact Mr. Lukas was inadequate to establish a lawful job-related reason for rejection of that applicant (AF 25-26). In a rebuttal letter, Employer contended that it had contacted Mr. Lukas, but discovered that he was not interested in the job offer (AF 6).

The CO issued a Final Determination on September 30, 1988 (AF 4-5). She found that Employer should have followed up on its initial, unsuccessful attempt to contact Mr. Lukas by telephone with a written communication, with proof of such effort such as a copy of the letter and a return receipt from the postal service. She noted that Employer successfully contacted the applicant after the NOF, finding that the applicant was no longer interested in the job.

Discussion

An employer is under the affirmative duty to commence review and make all reasonable attempts to contact U.S. applicants as soon as possible. Creative Cabinet and Store Fixture, 89-INA-181 (Jan. 24, 1990) (en banc). Mr. Lukas' resume shows such a broad range of experience, education, and training that there was a reasonable possibility that he was qualified for the job; hence Employer was obliged to investigate his credentials as soon as possible. Creative Cabinet, supra; see also Gorchev & Gorchev Graphic Design, 89-INA-118 (Nov. 29, 1990) (en banc). In a number of decisions, the Board has determined that merely calling a telephone number and leaving a message constitutes a failure to make a reasonable effort to contact an applicant. Dove Homes, Inc., 87-INA-680 (May 25, 1988) (en banc); Bruce A. Fjeld, 88-INA-333 (May 26, 1989) (en banc); Bay Area Women's Resource Center, 88-INA-379 (May

26, 1989) (en banc). Furthermore, reasonable efforts to contact a qualified U.S. applicant may, in some circumstances, require more than a single type of attempted contact. Diana Mock, 88-INA-255 (Apr. 9, 1990).

Here, Employer's recruitment report is entirely inadequate. It fails to indicate when or how many times Employer attempted to contact Mr. Lukas by telephone. It fails to indicate whether the attempted contact or contacts were to his place of business or his home, or with whom the message was left, or what the substance of the message was. It fails to show that Employer attempted alternative means of communication, such as a letter. Though Mr. Lukas invited the leaving of a message, given the total lack of detail concerning Employer's attempt or attempts to contact the applicant, the CO correctly found that Employer failed to establish that it had rejected Mr. Lukas for a lawful job-related reason.

Employer's later rebuttal letter only states that it discovered that Mr. Lukas was not interested in the job. The Board has consistently held that an applicant's expression of disinterest or lack of availability upon recontact does not cure an initial improper rejection. Arcadia Enterprises, Inc., 87-INA-692 (Feb. 29, 1988).

The Board, en banc, has yet to decide whether an employer's failure to contact an apparently qualified applicant timely can be fortuitously cured by later establishing that the applicant would not have taken the job even if it had been timely offered.[1] Employer, on appeal but not before the CO, claims it established that Mr. Lukas rejected the job because he felt the job was "too far", when it belatedly contacted the applicant by telephone on August 16, 1988, four months after the recruitment period.

Employer's case presents too little, too late; this is true even if the Board, arguendo, were to permit the "fortuitous cure" defense. In the first instance, Employer's evidence and argument that Lukas would have rejected the job for geographic reasons could have been, but was not, presented to the CO in its August 19, 1988 rebuttal.[2] The sentence in the rebuttal that Lukas was "not interested in the job offer" was insufficient to alert the CO to Employer's present position

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[1] In Bada Apparel, 87-INA-712 (Apr. 13, 1988), the employer's failure to interview a U.S. applicant was excused where it established that the applicant was not available for the position at the time of initial recruitment. In that case, Employer proved that it had made several attempts to contact the applicant, a questionnaire sent to the applicant by the CO confirmed that he had in fact been contacted, and despite his contention that he had been rebuffed when calling Employer, he was not available at the time because he had already had a better job. The panel deciding that case also determined that Employer had not evidenced a lack of good faith. See also Ironclad Inc., 88-INA-477 (Feb. 12, 1990) (three separate opinions by Judges Brenner, Guill and Tureck).

[2] The Board cannot consider on appeal evidence not in the record upon which the denial of certification was made. University of Texas at San Antonio, 88-INA-71 (May 9, 1988) (en banc). Likewise, the Board will not consider argument raised for the first time after issuance of the Final Determination. Huron Aviation, 88-INA-431 (July 27, 1989).

before us that Lukas affirmatively rejected the job because it was too distant (AF 6). The fact that someone representing Employer wrote "too far" on Lukas' resume, among other notes regarding actual or scheduled dates of 8/14 and 8/16 for attempted or actual contacts with Lukas does not rise to the level of argument and evidence presented to the CO simply because it was in the file (AF 19). Cryptic notes on a resume should not have to be deciphered by the CO in an attempt to discover Employer's theory for rejection.

In any event, there is insufficient evidence that Lukas rejected the job because he thought it was too far. For all we know, one of Employer's representatives concluded that Lukas lived too far from the job location, and noted this on the resume. The factual theory presented by counsel in a brief cannot serve as evidence of material facts. Employer presents no corroboration from Lukas, nor even an affidavit from its unidentified representative who wrote "too far" on the resume.

We do not today decide whether a failure to make reasonable efforts to contact a U.S. applicant during the initial recruitment process can be cured by later discovery of a lawful ground for rejection of the applicant unrelated to the lack of timely contact. Assuming arguendo that this "fortuitous cure" defense is the law, and accepting arguendo that Lukas told Employer that the job was "too far," the record fails to establish that distance was the sole reason for Lukas' disinterest when he was finally contacted. Perhaps the untimely contact dampened any enthusiasm Lukas had for moving to a new locale.[3]

Based on the foregoing, the Board concludes that Employer has failed to establish that it made reasonable efforts to contact Lukas during the initial recruiting process, that it made a reasonable presentation to the CO of its position (first stated clearly in argument before the Board) that Lukas stated the job was too far when finally contacted, that the cryptic notes on Lukas' resume in fact establish that Lukas was the person who made the "too far" comment, and even if Lukas made the comment, that distance alone contributed to his lack of interest in the job. Accordingly, the CO properly denied labor certification.

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[3] Employer is located in East Hampton, Connecticut (AF 40). The job advertisement stated that responses should be sent to the Connecticut job service office (AF 43). On his resume Mr. Lukas provided an address in Cornwall, New York, and indicated that his area of geographical interest consisted of New York City, Northern New Jersey, Westchester [New York] and Fairfield [Connecticut] counties. He added that he would consider permanent relocation to other areas (AF 19). We note that Employer is beyond reasonable commuting distance from Lukas' home.

ORDER

The Final Determination denying labor certification is hereby AFFIRMED.

At Washington, D.C. Entered:

by:

LAWRENCE BRENNER
Administrative Law Judge

LB/trs